No. 4914

United States
Circuit Court of Appeals
For the Ninth Circuit

IDA BENN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Opening Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

JULIA WALDRIP KER,
Walker Building, Olympia, Washington.

HARRY L. PARR,
Suite 5, Funk Building, Olympia, Washington,
Attorneys for Plaintiff in Error.

No. 4914

United States
Circuit Court of Appeals
For the Ninth Circuit

JIM BENN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Opening Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

JULIA WALDRIP KER,
Walker Building, Olympia, Washington.

HARRY L. PARR,
Suite 5, Funk Building, Olympia, Washington.
Attorneys for Plaintiff in Error.

The questions involved in this case and the manner in which they are raised are as follows:

1. Are mere suspicious circumstances susceptible of two meanings sufficient for conviction of a felony?

This question is raised by the Motion for a New Trial and Arrest of Judgment.

It is also raised by the third Assignment of Errors.

2. Is the admission of evidence of stills not connected with the defendant nor on his land, over the objection of the defendant, reversible error?

This question is raised by Motion for a New Trial and Arrest of Judgment and Assignment of Errors No. 1.

3. Is the extensive cross-examination by the prosecution of the defendant on a collateral matter for the purpose of prejudicing the defendant in the eyes of the jury reversible error?

This question is raised by ground No. 1 of Motion for a New Trial and Arrest of Judgment and Assignment of Error No. 2.

4. Is a prosecution, there being no direct testimony, proper, under sections 3281 and 3282 of the Revised Statutes of the United States when the whole case is considered by all the parties as nothing but an ordinary case under the National Prohibition Act?

This question is raised by ground No. 2 for Motion for a New Trial and Arrest of Judgment and No. 3 of the Assignment of Errors.

5. Can one be indicted under sections 3281 and 3282 when the real intent of the prosecutor is to prosecute for a violation of the National Prohibition Act?

This question is raised by Motion for New Trial and Arrest of Judgment, ground No. 2, and also by Assignment of Error No. 3.

The Motion for a New Trial and Arrest of Judgment is found on page 5 of the Transcript of Record.

The Assignment of Errors is found on page 39 of the Transcript of Record.

STATEMENT OF FACTS

Plaintiff in error, Jim Benn, lives about three miles from the city of Olympia, Thurston County, State of Washington, in the vicinity of what is known as Butler's Cove, a populous region containing many summer homes and the Olympia Golf & Country Club. He also owns some land in the Bald Hills, about forty miles from his home place.

In the fall of 1925 Jim Benn was making various improvements to his place in the Bald Hills and at intervals visited it to see what progress was being made by the men he had employed for that purpose.

In October, 1925, government prohibition agents

found two old still locations near the Jim Benn property in the Bald Hills. A new still was found on land adjoining the Jim Benn property. According to the testimony of the government agents there were trails leading from the new still to the house on the Jim Benn place.

There is no pretense on the part of the prosecution that Jim Benn ever lived on the Bald Hills property or that he was there or anywhere near it at the time the still and mash was found.

I.

Are Mere Suspicious Circumstances Susceptible of Two Meanings Sufficient for Conviction of a Felony?

All of the evidence of this case as shown by the testimony offered by the prosecution was purely circumstantial; there was not one particle of direct evidence. That the trial judge realized this is shown by the following instructions to the jury:

"The evidence in this case relied upon by the prosecution for conviction was purely circumstantial. Now, a conviction under circumstantial evidence is warranted under the law providing the evidence measures up to certain requirements of the law. Among these the jury has to be convinced beyond a reasonable doubt from the evidence that all circumstances so relied upon have been established.

All of such circumstances must be consistent with each other, must all be consistent with the defendant's guilt and must all be inconsistent with any reasonable theory of the defendant's innocence."

"It is for you to weigh the circumstances relied upon for conviction in this case and consider whether they are susceptible of any reasonable explanation consistent with the theory of the defendant's innocence. If they are, then it is your duty to acquit, if they are not it is your duty to convict."

Statement of Facts, pages 118 and 119.

While we have quoted the instruction which substantiates our view that all of the evidence was purely circumstantial, we do not believe that the instruction given was a proper one. The court erred in giving this portion of the instruction:

"It is for you to weigh circumstances relied upon for conviction in this case and consider whether they are susceptible of any reasonable explanation consistent with the theory of defendant's innocence."

This was in the nature of a comment on the testimony and was prejudicial and erroneous. It was a suggestion to the jury that it was to consider from all the evidence that the circumstances were not susceptible of reasonable explanation consistent with the defendant's innocence. It led the jury to believe so far as the circumstances were concerned that they

were conclusive of the defendant's guilt and that they, the jury, must look for circumstances to prove the defendant's innocence. In other words, the instruction was just the reverse of what the court should have given. The court should have laid stress upon the jury as to defendant's innocence. The defendant was presumed to be innocent and the whole inquiry should have been directed to the determination of his guilt. The inquiry of the jury should not have been directed to the innocence of the defendant on the theory that the circumstances were so complete and so knit together that they could move from that premise to an inquiry as to the defendant's innocence.

The instruction which should have been given covering circumstantial evidence is one which has been approved in the case of *Lamb vs. U. S.*, 264 Fed. 1662, where it says:

"The circumstantial evidence is the only evidence in this case, as the case is made entirely of circumstantial evidence. That circumstantial evidence in order to award a conviction must be of such sufficient strength that it excludes every reasonable doubt of guilt."

Reverting now to the main argument, we desire to call the court's attention to some of the decisions of the Federal Court where verdicts of the jury were

reversed because so-called circumstances were insufficient in the mind of the court to prove the guilt of the accused.

The first case is that of *Turnetti vs. U. S.,* 2 Fed. (2nd) 15, where the court says:

"Whenever circumstances are relied upon as evidence of guilt they must be such as to admit of no other reasonable hypothesis or explanation other than the guilt of the accused."

Practically the only suspicious circumstance connecting Jim Benn with this case is a letter which was found October 23, 1925, in the shack containing the still, which letter was addressed to Jim Benn at Butler's Cove and which was postmarked September 2, 1925.

(Statement of Facts, page 9.)

All other testimony is immaterial and has no connection with the defendant. The still was found off the land of defendant; the mash was found off the land of defendant. The only thing that in any way brought the defendant's name into the case was the finding of the letter aforesaid. The finding of the letter does not necessarily mean that the man had been there. There are many ways in which the letter could have gotten there. Surely it is not a circumstance strong enough to find a man guilty of a felony. It could not possibly prove that he himself

was there or had been there or that he operated the still found off his own premises or that he made the mash which was found off his own premises nor did it furnish such proof as would conform to the law as to circumstantial evidence. The finding of the letter could be taken by the jury as a very innocent circumstance and the jury could also construe it as a suspicious circumstance. The finding of this letter and its consideration by the jury comes under the rule laid down in the case of *Lamb vs. U. S.,* just cited.

The government agent testified that he did not find Jim Benn on the place where the still and mash was found; that he did not know the lines of the property; that the sugar which was found was in a barn and that there was no sugar at the still.

The next suspicious circumstance relied upon by the government was that a Ford truck was found on the premises and that one of the agents took its number and on investigation found that it was the property of Jim Benn.

(Statement of Facts, page 38.)

The defendant explained its presence by stating that he had brought the truck up there that morning for the purpose of getting a horse and not being able to find the horse had left it there intending to come back later.

(Statement of Facts, page 52.)

The finding of the truck was the second suspicious circumstance, and these two things, to-wit: the letter and the Ford truck, were the circumstances upon which the government based its case against Jim Benn. In order to appear to strengthen its case against Jim Benn, over the objections and protests of the attorneys for appellant in error, the government was allowed to introduce testimony respecting two old still locations. Mr. Croxall, witness for the government, was permitted over counsel's objections to tell of these old locations, although the gentleman did not pretend in any way to connect them with the defendant, and each government witness did the same.

The Statement of Facts, page 18, shows the following:

"Q. We went up to this meadow, this brush up here, and found two places where stills had been in operations, but their wells or water holes had gone dry and they had moved out.

MR. PETERSON: If the Court please, we object to that; it is not claimed that the defendant had anything to do with these stills.

THE COURT: Do you expect in any way to connect these with the defendant or this operation?

MR. GORDON: Merely the circumstance that they are on or near the Benn place.

THE COURT: Objection overruled. It may be a circumstance.

MR. PETERSON: We desire an exception.

THE COURT: Gentlemen of the jury: Unless you find something in the evidence to connect the evidence of the former still operations there with this defendant, do not be prejudiced against him by this evidence.

Exception allowed."

When R. L. Ballinger took the stand for the government he gave the same testimony and Mr. Peterson made the same objection and the court made the same ruling.

Statement of Facts, pages 21, 22.

And also when R. A. Lambert testified for the prosecution the same question was asked and Mr. Peterson made the same objection and the court made the same ruling.

Statement of Facts, pages 22, 23.

The trial court erred in admitting this testimony. The trial court convicted the defendant in the eyes of the jury when he said, "Objection overruled. *It may be a circumstance.*"

This was a comment on the evidence. This was left with the jury as a circumstance and never at any time was the court's error correct. The court had asked the United States attorney if he expected to

connect the defendant *or* this operation. The United States attorney said no. The United States attorney then said: "Merely the circumstance that they are on or near the Benn place." It was then that the court made its comment that: "It may be a circumstance."

The remarks then immediately addressed to the jury made the situation worse, not better. The United States attorney had announced that he was not trying the defendant on these old stills and yet with that announcement fresh in mind of court and jury, the court told the jury that if they found, "evidence to connect the evidence of the former still operations there with this defendant" that they were to consider said evidence.

That is what convicted the defendant. Suspicious circumstance not coupled or connected with other suspicious circumstance was permitted to go to the jury until the jury were led to believe that suspicious circumstances were sufficient to convict the accused. These old still locations were never connected with the defendant at any time during the trial. And this was done in a case where the defendant was on trial for a felony.

The defendant's motion for a directed verdict of not guilty on the grounds that there had been no testimony connecting the defendant with the still and mash found on premises adjoining his should have been granted. There are, as said before, only two

circumstances which could be considered suspicious in this case, *i. e.,* the finding of the letter addressed to Jim Benn, and the truck bearing license number issued to Jim Benn, on the premises.

Guilty knowledge of a still even if proven does not make one the operator of a still. Guilty knowledge of mash does not make one the operator of a still or the maker of the mash. But in this case there is no guilty knowledge of either the still or mash brought home to Jim Benn. In order to bring in a verdict of guilty on the circumstances shown by the government the jury was compelled to rely upon conjecture and imagination. The court erred in not directing a verdict in favor of defendant at the close of the government's case and failing to do so should have done so at the close of defendant's case.

Cases where convictions were had on suspicious circumstances have been universally reversed by the Federal Court. Attention is called to the case of *Turnetti vs. U. S.,* where the court says:

"Whenever a circumstance relied upon as evidence of criminal guilt is susceptible of two inferences one of which is in favor of innocence, such circumstance is robbed of its probative value, even though from the other inference guilt may be fairly deductable."

In that case the circumstance relied upon was that Turnetti was the owner of the building in which

the still was found and that the ownership of the building was a suspicious circumstance. That the owner of the building paid the water rents for the place where the still was, that the still was so large in its capacity and construction that the owner of the place must have known of it; that the rear entrance used by the owner and the other party were so near one another that the owner could not help knowing that there was a still there.

Then again the courts have said in the case of *DeVilla vs. U. S.,* 294 Fed. 535, as follows:

"Evidence that raises a strong suspicion of the defendant's guilt is not of legal sufficience to justify a verdict of guilty."

Again the court has said in the case of *DeLuca vs. U. S.,* 290 Fed. 412, as follows:

"If circumstantial evidence alone is relied upon for the conviction of the defendant the circumstances proven must not only point to the defendant's guilt, but must be inconsistent with his innocence."

"Where guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstances are robbed of probative value, even though from the other inference guilt may be found deductable."

In that case the circumstances relied upon and which the court declared were merely suspicious cir-

cumstances, were far stronger than that of the case at bar. In the *Turnetti* case the owner of the building was acquitted although the still was in his building. The evidence showed that the owner of the building paid the water rents and that the still was of so large a capacity that the owner of the place ought to have seen it. In the *Benn* case the still and the mash were not even on the Benn premises and Benn did not reside on the premises in controversy but lived in Butler's Cove in Olympia forty miles away and did not visit the Bald Hill place except when he went there to find out what his men were doing in repairing the fences and ditching.

We again ask the court's attention to the case of *DeVilla vs. U. S.,* 294 Fed. 535, where it says:

"Evidence that raises a strong suspicion of the defendant's guilt is not of such legal significance as to justify the verdict of guilt."

Then again the court has said in the case of *DeLuca vs. U. S.,* 290 Fed. 412, as follows:

"If circumstantial evidence alone is relied upon for conviction of the defendant the circumstances proven must not only point to the defendant's guilt but must be inconsistent with his innocence."

"They (cir. ev.) must be such as to admit of no other reasonable hypothesis or explanation other than the guilt of the accused."

The testimony of the prosecution in the *Benn* case, as has been said before, contains no direct testimony. What are called circumstances did nothing but excite the jury and were nothing but suspicious circumstances. On some theory not clear to appellant in error the trial judge permitted the prosecution to show the finding of two old stills not on Jim Benn's land and the government disclaimed any interest in these stills. But the court having admitted the testimony the jury was bound to believe that these were circumstances which they were obliged to consider.

III.

Is the Extensive Cross-Examination by the Prosecution of the Defendant on a Collateral Matter for the Purpose of Prejudicing the Defendand in the Eyes of the Jury Reversible Error?

During the cross-examination of Jim Benn the United States attorney questioned him about trouble with Mr. Smythe. There was no testimony concerning trouble brought out in the direct examination of Mr. Benn. Where the United States attorney got this information of trouble is unknown. The following took place in the trial of the cause:

"Q. Did he ever make demand upon you for those cattle?

MR. PETERSON: I do not think we ought to try that case. I object as being immaterial.

MR. GORDON: The purpose of it is to show that this man desired to get rid of Smythe.

MR. PETERSON: I don't think that is the way to show it. Mr. Smythe is here. We are going to put him on the stand.

THE COURT: Objection overruled.

MR. PETERSON: We desire an exception.

THE COURT: Exception allowed."

(Statement of Facts, page 27.)

This cross-examination should not have been permitted. But it was permitted to the prejudice of the defendant's rights. Taken alone it might not seem to have injured the defendant but coupled with the two old still locations and the suspicious circumstances upon which the government built its case, it was the last straw that broke the camel's back. In a case where there was some direct testimony it might not have mattered but in this case where compelled to magnify greatly the slightest in order to rise at a verdict of guilty it was highly improper.

IV.

IS A PROSECUTION, THERE BEING NO DIRECT TESTIMONY, PROPER, UNDER SECTIONS 3281 AND 3282 OF THE REVISED STATUTES OF THE UNITED STATES AND WHEN THE WHOLE CASE IS CONSIDERED BY ALL THE

PARTIES AS NOTHING BUT AN ORDINARY CASE UNDER THE NATIONAL PROHIBITION ACT?

We venture to suggest that never before the passage of the 18th Amendment was a cause tried under sections 3182 and 3181 under circumstantial evidence alone.

These sections do not lend themselves handily to circumstantial evidence. Sections 3281 reads as follows:

"Every person who carries on the business of a distiller without having given bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for each offense, be fined not less than $1000 nor more than $5000 and imprisoned not less than six months nor more than two years."

There must be a *carrying on* of a business of a distiller without having given a bond. Even the possession of a still does not necessarily imply the *carrying on* of the business of a distiller. There never was in this case even a suspicious circumstance that Jim Benn was *carrying on* the business of a distiller. The jury had to wildly conjecture and vividly imagine before they could arrive at that point. There being no direct testimony the circumstances required to convict would have to be circum-

stances showing that Jim Benn exercised control over the distillery and that it was operated by men under his control.

Section 3282 reads as follows:

"No mash, wort, or wash, fit for distillation for the production of spirits for alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort or wash so made" etc.

Is testimony of mash on the lands of others testimony that Jim Benn had the mash in his possession or control? That was the testimony in this case. A pertinent circumstance to show that one had mash would be to have it on one's own land. But there was no such circumstance here. There was not even a hint that would connect the defendant with the mash.

The government never approached, in its testimony a proper case under the two sections above quoted. The prosecution entirely mistook its case. The only investigation that it should have made was as to whether or not Jim Benn owned a still on property adjoining his property. And the prosecution did not have facts or circumstances sufficient to convict Jim Benn of owning the still. Surely then they could not take the next hurdle and convict him of operating a still that he did not own. With passion or prejudice or entire ignorance of their duties the

jury found an erroneous verdict in this case. Surely in a felony case the government should be required to prove a man guilty of the crime charged.

V.

Can One Be Indicted Under Sections 3281 and 3282 When the Real Intent of the Prosecutor Is to Prosecute for a Violation of the National Prohibition Act?

It may be thought presumptious for the writers of this brief to attempt to add anything to the vast and profound discussions that have taken place over sections 3181 and 3182. These sections were repealed under the authority of *U. S. vs. Yungenovich,* 65 Law Ed. page 1043. Thereafter under act November 23, 1921, page 134, section 5, 42 statutes page 223, Congress again reenacted sections 3181 and 3182 and under the authority of the *U. S. vs. Staffoft,* 67 Law Ed. page 358, sections 3182 and 3181 having been reenacted are now of full force and effect.

The records in this cause are silent from cover to cover as to any testimony that the plaintiff in error ever carried on a distillery and are silent as to whether or not the plaintiff in error ever had any mash.. The case was tried by the United States on a theory that if they proved a still was on said land or near said land or had been at one time on said land, that it was not necessary to prove that the still

was ever in operation or that there ever was any mash on said land. The contention of the plaintiff in error is that the United States failed entirely in its proof and that the only thing proved, if proved at all, was that at one time that on land adjoining that of plaintiff in error there may have been a still, but there is no proof that that still was operated or had any mash. The gist of section 3281 is *carrying on a distillery without giving bond* and in order to prove the allegation there must be some testimony showing a *carrying on* or some testimony showing that there was a distillery in operation and even if that was shown there must be testimony that the plaintiff in error was the person who operated said still. The same argument applies to section 3282. The government has made no case until they show that there was mash on said premises and even having shown that deed, then have to proceed and connect up the plaintiff in error with the mash.

The National Prohibition Act provides for the continuance of stills for the manufacture of intoxicants for non-beverage purposes. Under that act a still cannot be used for any other purpose except the manufacture of intoxicants for non-beverage purposes. Revised Statutes, section 3282, forbids the making of a mash for the production of spirits on premises other than a duly authorized distillery. That section has only to do with stills that are used

for the manufacture of intoxicants for non-beverage purposes. That section has nothing to do with stills that are used for the purpose of manufacturing intoxicants for beverage purposes and consequently there can be no prosecution in the instant case.

The United States in *Sohm vs. U. S.*, 265 Federal page 910, a case brought under the National Prohibition Act, section 25, holds that no still or any implement of manufacture or any property designed for manufacture is permissible under the act and under said section if said property is for the purpose of manufacturing or being used in the manufacture of intoxicating liquors for beverage purposes. A still for medicinal alcohol is permissible under the law and permission is made for the same in section 7 of title 3 of the act. Section 9 of title 3 of the act exempts all such provisions of Revised Statutes as therein enumerated but section 3281 and section 3282 of the Revised Statutes are not those enumerated. The intention evidently then of the National Prohibition Act was not to bond or to license any stills or any material for the manufacture of intoxicating beverages under the National Prohibition Act when such liquor was made for beverage purposes. It was the design and purpose of the Act, however, to keep in full force and effect section 3281 and section 3282 when applied to distilled alcohol as shown by section 9 of the Act.

The construction thus put on the *Staffort* case and thus put upon the National Prohibition Act and sections 3081 and 3082 is harmonious with the *Seaholm* case and with other decisions of the court. It is still, then wrong in our conception to endeavor to tax or license stills to be used for beverage purposes, but otherwise it is correct.

Is it presumptious for the writers of this brief to suggest that Title II of the National Prohibition Act always having been silent as to sections 3281 and 3282 and Title III of the act having expressly kept in force sections 3281 and 3282 that these facts were not cited to the Supreme Court in the discussion of these sections? In our humble opinion if it had been called to the attention of the Court that Congress had in mind sections 3281 and 3282 when the National Prohibition Act was enacted there might have been a different decision in the *Yungenovich* case. However be that as it may the government failed to produce anything except suspicious circumstances in this case.

We respectfully submit that this cause be remaded with instructions to the lower court to dismiss the same.

Respectfully submitted,

JULIA WALDRIP KER

HARRY L. PARR

Attorneys for Plaintiff in Error.